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Ogden Standard Examiner and State Insurance Fund v. Industrial Commission of Utah et al : Brief of Defendants

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

OGDEN STANDARD EXAMINER and STATE INSURANCE FUND, Plaintiffs, vs. THE INDUSTRIAL COMMISSION OF UTAH and LESLIE SKELTON and T. R. CHENEY, co-conservators for the dependent children of CLIFFORD CHENEY, deceased, Defendants.	:	Case No. 18311

WRIT OF REVIEW FROM AN ORDER OF

THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFFS

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BRIEF OF PLAINTIFFS

NATURE OF THE CASE

A petition for writ of review was filed by the plaintiffs Ogden Standard Examiner and the State Insurance Fund to review an order of the Industrial Commission holding them liable for compensation benefits to the dependents of Clifford P. Cheney.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held June 5, 1981 before Administrative Law Judge Joseph Foley on the application of the conservators of the minor children of Clifford Cheney for workmen's compensation benefits. The employer of the deceased and its insurance carrier denied liability for his death on the ground that it did not arise out of or in the course of his employment. On November 25, 1981 the Administrative Law Judge entered his find-

ings of fact, conclusions of law and order holding the plaintiffs liable to the dependents of the deceased for compensation benefits. A timely motion for review was filed by the plaintiffs pursuant to Utah Code Ann. (1953) Sec. 35-1-82.53, as amended. On February 19, 1982 the Industrial Commission, through two of its members, entered an order denying the plaintiffs' motion for review and adopting the findings and conclusions of the Administrative Law Judge. The third member of the Commission filed a dissenting opinion expressing his conclusion that Mr. Cheney's death did not arise out of or in the course of his employment.

RELIEF SOUGHT ON APPEAL

Plaintiffs respectfully request that the court reverse the order of the Industrial Commission holding them liable for workmen's compensation benefits as a result of the death of Clifford Cheney.

STATEMENT OF FACTS

At the time of his death on Saturday March 22, 1980, Clifford Cheney was the Managing Editor of the Ogden Standard Examiner. He had served in that capacity for nine months. (R 180)

As managing editor, it was his responsibility to supervise those in the editorial department in the preparation of the news and editorial content of the newspaper. He had never personally covered any news event for the paper or written a story on a news event himself. He had no public relations duties, and other employees were assigned that function. (R 278-279, 284)

Mr. Cheney died in an automobile accident which occurred in

the early morning hours on Highway 89 near Layton, Utah, as he was returning to his home in Ogden from Salt Lake City. Mr. Cheney was driving his own car when he apparently lost control on the slick road and was struck by an oncoming truck. His wife, the only passenger in the car, was also killed. (R 3-5)

Mr. and Mrs. Cheney had spent Friday evening in the company of Mrs. Wilda Gene Hatch, president of the Standard Corporation (which does business as the Ogden Standard Examiner), her husband George Hatch, their son Randall Hatch and his wife. They had attended the annual Governor's Ball together and socialized at the home of the Hatches before and after the event.

Mr. George Hatch testified at the hearing in this matter that prior to the evening in question he acquired two tickets to the Governor's Ball by virtue of his membership in the "Century Club," an organization of contributors to the Democratic Party. Upon learning that several other members of the Century Club who worked in companies affiliated with the Standard Corporation had also acquired tickets, he reserved a table at the event for himself and Mrs. Hatch and six others. (R 259) Each ticket holder purchased his own membership in the club, and none were purchased by the Hatches or by the Standard Corporation. (R 259)

Later, several of those for whom Mr. Hatch had reserved seats decided not to attend, and they made their tickets available to him. (R 259,265) He discussed with his wife who they thought might enjoy attending the ball. It appeared originally that only one pair of tickets was available, and the Hatches invited their son and daughter-in-law to use them. When it developed that

they would be given others, they decided to invite the Cheneys. (R 240-241)

Mrs. Hatch testified that on Monday or Tuesday of the week of the ball she met Mr. Cheney in the hall at the office of the Standard Examiner. She asked him if he had ever attended the Governor's Ball. He said that "he had always wanted to go." (241) She told him that she might have some extra tickets and would let him know later. (R 241) On Wednesday afternoon Mrs. Hatch told Mr. Cheney that she would, in fact, have extra tickets, that her son and daughter-in-law were attending, and asked whether he would like to attend. He told her that he would discuss it with his wife and would let her know. (R 242)

The following day, either by phone or at the newspaper office, Mr. Cheney accepted Mrs. Hatch's invitation. He stated that he would drive down to Salt Lake from Ogden rather than ride with Randall Hatch, and Mrs. Hatch invited him to come to their home before the ball. She testified that she invited them because she thought the Cheneys might enjoy a social evening with them. (R 242-243)

Mr. and Mrs. Cheney arrived at the home of the Hatches at approximately 6:15 Friday evening, and spent an hour there before leaving for the Salt Palace. Cocktails were served and Mr. and Mrs. Hatch, their son and daughter-in-law, and the Cheneys talked about their families, about traveling and camping in Utah, and about how the Cheneys liked living in Ogden. They admired the Hatch's collection of Indian artifacts and travel momentos and toured the house. There was no discussion about newspaper busi-

ness. (R 243-244, 261, 274)

At approximately 7:15 p.m. the group drove together in Mr. George Hatch's car to the Salt Palace. They sat at the table which had been reserved and spent the evening discussing the upcoming election campaign, as well as other topics about which they had been conversing previously, and meeting elected officials and others who came by their table. Mr. and Mrs. Cheney danced one dance, and the group left by 11:30 p.m. There was no discussion of the business of the Standard Examiner.

The city editor of the newspaper assigned a reporter, Flora Ogan, to cover the event as its press representative. She attended the ball and wrote the story about it which appeared the following day. (R 290-291)

The Cheneys returned to the Hatch's home after leaving the Salt Palace. Mr. Hatch served Mr. Cheney another drink and they talked about the ball. Randall Hatch discussed with his wife whether she wanted to spend the night in Salt Lake, and the Cheneys offered to give Randall a ride home. Randall and his wife decided to return to Ogden in their car, however, and the Cheneys left Mrs. Hatch's home at about 12:30 a.m. Business was not conducted or discussed. (R 246-247, 261-263, 276)

Testimony was presented at the hearing in this matter concerning the nature and purpose of the Governor's Ball, which is held annually to raise money for the Governor's political party. (R 6-25) Mr. Cheney's brother-in-law and sister-in-law and two co-workers also testified concerning statements he made to them about his intention to discuss business during his evening with

Mr. and Mrs. Hatch.

POINT 1

THE INDUSTRIAL COMMISSION'S FINDINGS OF FACT DO NOT SUPPORT ITS LEGAL CONCLUSION THAT CLIFFORD CHENEY'S DEATH AROSE OUT OF HIS EMPLOYMENT.

This Court has held many times that in reviewing an order of the Industrial Commission it will examine the findings of fact made by the Commission in light of the issue of law raised by a claim for benefits to determine whether an award is supported by those findings, Jones v. Industrial Commission, 90 Utah 121, 61 P.2d 10 (1936), and further, that it will review the evidence insofar as necessary to determine whether there is substantial, competent evidence upon which to support an award. Tintic Standard Mining Co. v. Industrial Commission, 100 Utah 96, 110 P.2d 367 (1941); Savage v. Industrial Commission, 565 P.2d 782 (Utah 1977). The plaintiffs respectfully submit that the findings of fact made by the Commission do not support its conclusion that Clifford Cheney's death arose out of or in the course of his employment within the meaning of the Utah Workmen's Compensation Act.

Utah Code Ann. (1953) Sec. 35-1-45 provides that the dependents of an employee "who is killed by accident arising out of or in the course of his employment" are entitled to workmens' compensation benefits. Construing Section 45 of the Compensation Act, this Court has held that an accident arises out of or in the course of employment if it occurs while an employee is performing his assigned duties, or is doing ". . . things which it should

reasonably be expected an employee would do in connection with those duties." United States Steel Corp. v. Draper, 613 P.2d 508, 509 (Utah 1980). In the case of Askren v. Industrial Commission, 15 Utah 2d 275, 391 P.2d 302, 304 the court stated that

> [t]he essential thing is that there be some substantial relationship between the activity engaged in and the carrying on of the employer's business.

More precisely, this court has held that the phrase "arising out of" as used in Section 45 refers to the origin or cause of an injury, and that the phrase "in the course of" refers to the time, place and circumstances of an injury. Utah Apex Mining Co. v. Industrial Commission, 67 Utah 537, 248 P.2d 490 (1926). The court stated that,

> An injury which occurs in the course of the employment will ordinarily, but not necessarily, arise out of it, while an injury arising out of an employment almost necessarily occurs in the course of it.

248 P.2d at 413.

In the case of an employee whose place and hours of work are fixed, it is usually not difficult to ascertain whether an accident arises out of or in the course of his employment. When an injury occurs to an employee whose place and time of work are flexible, more difficult questions may be presented, just as the issue may be closer when an employee who is injured outside the ordinary place or hours of employment claims that some special nexus between his employment and the after hours, off premises injury brings it within the scope of the Compensation Act.

Professor Arthur Larson, (hereinafter referred to as "Larson"), in his treatise, Workmen's Compensation Law, examines a variety of circumstances where injuries to workers may present difficult questions of compensability, including injuries which arise out of an employee's attendance at a social event. Summarizing the law of American jurisdictions generally, Larson states that

> Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Larson, supra, Vol. 1A, Sec. 22 p. 5-71.

The case at bar does not concern an accident on an employer's premises, and Larson's analysis is useful in this instance in its second and third facets. With reference to the second basis for bringing a social activity within the course of a worker's employment Larson states that,

> The distinctive feature of this test is that it turns on what the employer himself does.

Larson, supra, Vol. 1A, Sec. 22.2 at p. 5-78.

Larson examines a range of conduct on the part of an employer

which might bring social or recreational activity within the course of employment by him. If an employer makes attendance at social affairs a part of an employee's job description, or if an employer actually requires an employee's attendance at a given event, its relation to the course of his employment is clear. When the employer's involvement with the social event is less, the question is closer, however.

> When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer, and it becomes necessary to consult a series of tests bearing on work-connection. The most prolific illustrations of this problem are company picnics and office parties. Among the questions to be asked are: Did the employer in fact sponsor the event? To what extent was attendance really voluntary? Was there some degree of encouragement to attend in such factors as taking a record of attendance, paying for the time spent, requiring the employee to work if he did not attend, or maintaining a known custom of attending? Did the employer finance the occasion to a substantial extent? Did the employees regard it as an employment benefit to which they were entitled as of right? Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

1A Larson, supra, Sec. 22.23, p. 5-85.

When the degree of employee involvement in sponsoring or promoting an event is minimal, courts may, in Larson's view, properly inquire whether the employer derived sufficient direct benefit from an employee's attendance to make it effectively a service to his employer. As examples of such benefits, Larson cites cases where compensation was awarded because of the en-

hancement of sales which a businessmen's entertainment of customers is expected to produce, the advertising benefit which may result from a company softball team, or the opportunity of which an employer may avail himself at a social event to present awards or make speeches. 1A Larson, supra, 22.30.

Larson emphasizes, however, that less tangible benefits to an employer from an employee's social activities such as improved relations, better morale, or increased efficiency have been found insufficient to bring an activity within the coverage of compensation acts. The problem, Larson notes,

> is not that such benefits do not result, but that they result from every game the employee plays whether connected with his work or not. . .
>
> * * *
>
> And so, just as in the sleeping and eating cases some arbitrary time and space limitations must circumscribe the area within which the "benefit" establishes work-connection, the recreation cases must submit to some similar limitation, since otherwise there is no stopping point which can be defined short of complete coverage of all employee's refreshing social and recreational activities. It can be taken as the majority view that these morale and efficiency benefits are not alone enough to bring recreation within the course of employment.

1A Larson, supra, Sec. 22.30 at Pp. 5-116-117.

This Court has not had occasion to adopt expressly the Larson test of the compensability of accidents which arise out of participation in a social event. The Court has, however, relied on Professor Larson's analysis of other course of employment issues as with injuries arising out of horseplay,

e.g., Prows v. Industrial Commission, 610 P.2d 1362 (1980). Furthermore, a review of Utah decisions discloses a strict adherence to the principle that the course of employment includes only those activities in which an employee is reasonably required to engage in the performance of his duties, and which directly and tangibly benefit his employer.

In the case of Lundberg v. Cream O'Weber Dairy Farms, 24 Utah 2d 16, 465 P.2d 175 (1970), the Industrial Commission denied benefits to the widow of a sales manager who died in an automobile accident while driving home from a special sales meeting held before normal working hours. The court affirmed the denial, holding that the case fell within the rule that an employee is not acting in the course of his employment when he drives to or from work.

> It is true that the statute does not require that a compensable accident be at any particular place and that Workmen's Compensation coverage has been approved in certain cases even though the employee had not arrived at the place of employment.
>
> * * *
>
> Notwithstanding what has been said in those cases, it is fundamental that even though the employee may not be at a regular place of work, he must be performing a duty for his employer, or one which is so connected with his employment as to be an essential part thereof, so that the mandate of the statute is met that there must be an "accident arising out of or in the course of employment." (emphasis supplied)

465 P.2d at 176.

It was noted that the general rule in Utah and in other jurisdictions is that injuries sustained while an employee is

going to or coming from work are not compensable. See also: Barney v. Industrial Commission, 29 U.2d 179, 506 P.2d 1271 (1973); Roberts v. Industrial Commission, 87 Utah 10, 47 P.2d 1052 (1935). Exceptions to the general rule have been allowed when an employer furnishes transportation to and from work, or when a route which is an employee's sole access to his place of work contains a hazard that is peculiar to that route, e.g. Cudahay Packing Co. v. Industrial Commission, 60 Utah 161, 207 Pac. 148 (1922). The applicant relied instead on another exception, contending that her husband was engaged in a "special mission" for his employer when he drove to the early morning sales meeting. Similarly, Professor Larson notes that when accidents which occur while driving to or from a social event are found to be compensable it is because the social event itself is found to be one which the usual test brings within the course of employment, so that the trip to attend it is a "special mission."1A Larson, supra, Sec. 22.23 p. 5-100, note 70.

This Court has analyzed "special mission" claims by the same criteria which apply to other course of employment issues. In the case of Wilson v. Industrial Commission, 116 Utah 46, 207 P.2d 1116 (1949), the court reversed an award of benefits to dependents of an employee who was killed on a trip from his home in Salt Lake City to a shop in Magna to repair a car for his employer, a used car dealer and auto repairman. The applicants contended that the deceased had been sent specially to Magna to perform that task. The employer contended that he had not directed the deceased to make a special trip for that purpose but

had merely informed him that he would be required to make the repairs after he arrived at work. The court stated the basis of its holding as follows:

> The employer's instructions in this instance merely directed the decedent as to what he should do after arriving at his place of employment. The instructions given did not send the deceased upon a special errand but merely outlined what would be expected of him in performing his duties the next day.

207 P.2d at 1119.

In Wilson, as in other cases construing the "special mission", or "special errand" rule, the test applied is whether or not the employee was instructed to make the trip which resulted in his death, or whether the trip was one otherwise part of the employee's duties.

The case of Board of Education v. Industrial Commission, 102 Utah 504, 132 P.2d 381 (1942), involved a physical education instructor employed by the Logan City Board of Education. The instructor was required as a condition of his employment to serve as a member of the Logan City Recreational Council which was a joint enterprise between the school district and the city. Because of his expertise on the subject, the instructor was asked to give an address about public recreation to the Lions Club in Brigham City. He was injured in an automobile accident returning to Logan.

The Supreme Court reversed the Industrial Commission's award of benefits to the applicant on the ground that there was insufficient competent evidence that a speech such as he had made

in Brigham City was part of his required duties as an employee of the Board of Education. The Court found no evidence that his employer had required the applicant to make the speech or that the employer benefited from any service rendered there.

The case of Auerbach Co. v. Industrial Commission, 113 Utah 347, 195 P.2d 245 (1948), concerned an automobile accident which arose out of a recreational event. A department store cashier was injured while driving to a basketball game in which she was to play on a team sponsored by her employer. Despite the fact that gas for her travel was purchased by the company, and that the public relations officer for Auerbach's was in charge of the team, the Industrial Commission's award of benefits to her was reversed by the Supreme Court. The Court held that since the applicant was not hired and compensated to play sports for her employer, and since her participation on the company team was entirely voluntary, her accident did not arise out of her employment. The concurring Justices noted that although the employer obviously derived some advertising benefit from the team it did not render the injured worker's travel to the sporting event part of her employment.

The case of Martinson v. W-M Insurance Agency, 606 P.2d 256 (Utah 1980), arose from an injury sustained by an insurance executive in an automobile accident while returning to his home in Salt Lake City from a social function in Park City he claimed to have attended for business reasons. The applicant's company insured the Kimball Art Center and he drove to Park City to attend its grand opening. He stayed over night with the director

of the center who was a friend and former employer.

Affirming the Industrial Commission's denial of benefits, the Supreme Court stated that

> To maintain actuarial soundness and integrity of workmen's compensation systems, it is essential that premiums be collected to cover the risks involved. The coverage does not, and as a practical matter, cannot extend to any injury done to an employee wherever and whenever it happens but is limited to accidental injuries which occur in the course of or arise out of the performance of his duties.
>
> * * *
>
> Reverting to the issue in this case in the light of what has just been said: the problem presented to the Commission was whether the plaintiff was actually and basically involved in the performance of his duties, or was mainly involved in a social situation with his friend and former employer, and then after he became involved in the accident, claims that he was engaged primarily in a business situation.
>
> In justification of its conclusion, the Commission noted certain significant facts: that except for his own testimony as to the desirability of doing so, there was no evidence that the plaintiff was directed or required by his employer to go to Park City on the insurance business; and that under the facts shown, there is no reason to believe that anything that needed to be done about increased insurance could not have been done without anyone leaving the Salt Lake Office. Consequently, it recited that upon its consideration of the whole evidence, its conclusion was that the plaintiff's trip was primarily social and not within the course of his employment. (emphasis supplied)

606 P.2d at 257-258.

Again in the Martinson case, the absence of sufficient evidence that the injured employee was directed to attend an event or that any substantial business was conducted there re-

sulted in a ruling that he had failed to sustain his burden of proving his injury was related to his employment.

The plaintiffs respectfully submit that in order to affirm an award of compensation benefits for the death of an employee in an automobile accident while returning from a social event, this court must determine that the Industrial Commission has made findings supported by competent evidence that are sufficient under the principles announced in prior Utah decisions to establish its compensability. At the very least, the Commission's findings must be consistent with Larson's analysis of claims arising out of social events; it must be found that the injured employee was expressly or impliedly required to attend the event or that his attendance there was of such a direct and substantial benefit to his employer that it could fairly be said to be within the scope of his services to his employer.

Turning to the findings of fact made by the Industrial Commission through the initial order of the Administrative Law Judge and in the order denying the plaintiffs' motion for review, it is clear that they do not support the conclusion that Clifford Cheney's death arose out of or in the course of his employment. In his order awarding benefits the Administrative Law Judge lists as findings of fact in addition to those which were stipulated by the parties, that is, the occurrence of the accident and the dependency of the children of the deceased, the following:

(1) the deceased was invited to attend the Governor's Ball by Mrs. Hatch; (R. 331)

(2) the deceased regarded his invitation as an opportunity to persuade Mrs. Hatch to publish a particular article and to discuss editorial policy; (R 332)

(3) the deceased did not have an opportunity to have the discussion with Mrs. Hatch he intended;

(4) the deceased was amply prepared to discuss work related matters had the opportunity presented itself.

In denying the plaintiffs' motion for review the two member majority of the Industrial Commission cited the following findings in support of their affirmance of the Administrative Law Judge's order:

(5) the deceased attended the function with a business purpose in mind;

(6) the invitation to attend by the employer brought the activity within the scope of his employment;

(7) the Ball was considered a business-linked event by many and the deceased attended the ball with the intent of acting as a representative of the Ogden Standard Examiner.

It is immediately apparent when the Commission's findings of fact are compared with the requirements for compensability of an accident under Utah law that the findings do not support the award made.

The Commission found that the deceased was "invited" by the president of the corporation which employed him to attend the Governor's Ball. It did not find that he was required either directly or indirectly to attend. The Commission found that no business was discussed at the event but that the deceased attended with the intention of discussing business or otherwise "representing" his business. However, the Commission did not find that the employer of the deceased actually benefited by his attendance through his performance of any business function, or through his presence in some capacity as a representative of the Standard Examiner.

The Industrial Commission's conclusions of law in this case stand in marked contrast to the decisions of this court in claims arising out of accidents which occurred as an employee was returning from an event away from the employer's premises. In each such case, this court has required a finding that the employee was actually engaging in a service to his employer at the time he was injured.

By finding simply what was conceded by all that the deceased was "invited" to attend the Governor's Ball, the Commission has concluded in effect that he was not "compelled" to attend. By finding that no business was discussed during the evening of Mr. Cheney's death, that he intended to do so but did not have the opportunity, the Commission has effectively found that no busniess purpose was served by his attendance at the ball and visit to the Hatch's home.

The only legal conclusion which can be drawn from the Com-

mission's own findings of fact is that the death of Clifford Cheney did not arise out of or in the course of his employment within the meaning of Utah Code Ann. (1953) Sec. 35-1-45 and the Commission's order should therefore be reversed.

POINT II

THE COMMISSION'S CONCLUSION THAT THE DECEASED'S DEATH AROSE OUT OF HIS EMPLOYMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Apart from a consideration of whether the Commission's findings of fact support its award, this court has jurisdiction on review to examine the record to determine whether there is substantial competent evidence to support the conclusion of the Industrial Commission that the accident in issue is compensable. The plaintiffs submit that there is no evidence in the record upon which the Commission could have made findings which would support the award.

Turning first to the question whether the deceased was expressly or impliedly required to visit Mrs. Hatch's home and attend the Governor's Ball, a test which focuses, as Larson noted, "on what the employer himself does,"1A Larson, supra, Sec. 22.2 at p. 5-78, the evidence is not in conflict.

Mrs. Hatch's testimony about her own conduct is, in its entirety, as follows:

> Q. Tell me how you came to invite Mr. Cheney, then.
>
> A. Well, I said, "Have you ever been to a Governor's Ball?" knowing that while he lived up in Logan, they hadn't been in Salt Lake that

much. And he said, "No, I've always wanted to go, but it was always too expensive."

Q. Where did this conversation take place?

A. Oh, I think in the hall, one of the hallways to the Standard.

Q. Do you remember what day of the week?

A. I think it was Monday or Tuesday.

Q. Monday or Tuesday of the week--

A. The week of the ball.

Q. To your recollection the conversation was in the hallway?

A. Uh huh. And so I said, "Well, I may have some extra tickets, but I'll have to let you know." And so that was the end of that conversation.

Q. When did you next converse with him about the invitation?

A. It was about Wednesday.

Q. What occurred?

A. Wednesday afternoon. I said: "I will have some extra tickets, and if you would like to come down to the ball with your wife that would be fine. My son is coming, and you could drive down with them."

Q. Where did you see Mr. Cheney on Wednesday?

A. I think he came in to my office to ask me something about the editorial department.

Q. Did he accept the invitation?

A. He said he would talk to his wife and see what they had planned and let me know.

Q. When did you next converse about the invitation?

A. I don't know whether he called or whether it was the next time I was up at the paper. He-- I really can't recall. He did indicate, whichever way it was, from a phone call or I ran into him at the paper, that they would like to come. And at that time I said: "Well, you know, it's not fancy. It's held in the Salt Palace, which is kind of barny, and they don't have a big fanfare like they used to. And so you don't have to wear a tux, and you wife can wear a short dress. It's not just a dressy affair any more."

And so then I said, "How do you want to come?" And he said, "We'll drive our own car."

And so I said, "That's fine." And I told him the time to come and to come by our house in Salt Lake ahead of the ball.

Q. What was your purpose in inviting Mr. and Mrs. Cheney to take those extra tickets to the ball?

A. I just thought that he might enjoy doing something social with us. I had been friends with Cliff for quite a long time. I knew him when he was up in Logan, not well, but I had seen him at various con-

> ferences and Sigma Delta Chi meetings. And I thought he would enjoy having a social evening, and especially since my son was coming down that they could get acquainted. And I had never met his wife. That occasion didn't often occur.

(R 241-243)

The relevant inquiry in reviewing the evidence is whether it could support a finding that (a) Mrs. Hatch either expressly or impliedly compelled Mr. Cheney to accept her invitation or (b) whether by her conduct or that of other supervisors, Mr. Cheney's attendance at the social event was made part of the services he was expected to render to the newspaper.

Courts have generally agreed with Professor Larson that compulsion to attend a social event may be indirect and subtle and yet still sufficiently forceful to make such an activity a requirement of employment. See, e.g., cases cited in an annotation at 47 ALR3d 566, "Workmen's Compensation: Injury Sustained While Attending Employer-Sponsored Social Affair." However, none of the factors which are generally relied on as evidence of indirect compulsion and were discussed earlier, are present in the case at bar.

Considering these factors individually, the evidence is undisputed that (1) the Governor's Ball was not a social event sponsored by the Ogden Standard Examiner; (2) Mr. Cheney's attendance was not specifically required; (3) there is no evidence of any known custom of managing editors of the newspaper attending the function; (4) tickets to the event were not purchased

or paid for by the employer; (5) no claim was made that attendance at the ball was an employee benefit to which Mr. Cheney was entitled.

The defendant may speculate as his counsel did in argument before the Commission that the disparity in age and in relative position at the newspaper made a social invitation from Mrs. Hatch to Mr. Cheney inherently compulsory. However, there is no evidence whatsoever from which the inference of compulsion to attend can be drawn. The tone of the interchange between Mrs. Hatch and Mr. Cheney, the fact that she asked him whether he would like to attend, that he stated he had always wanted to but had found it too expensive, and his response that he needed to check his plans with his wife, all suggest the voluntariness of the choice Mr. Cheney was given to attend.

The record is devoid of evidence of any other conduct on the part of supervisory personnel which would make attendance at the ball a required service of his employment.

It was the testimony of Mr. Cheney's immediate supervisor, Jay Banks, General Manager of the Standard-Examiner, that Mr. Cheney's position as managing editor included no duty to act as a public relations representative of the newspaper (R 284) and a reporter was assigned by the city editor to cover the event as a news story. (R 291) His successor, Mr. Randall Hatch, testified that public relations activities are entirely inconsistent with the detachment and impartiality required of one who manages the news and editorial department. The Industrial Commission's finding that the deceased attended the Governor's Ball

"with the intent of advancing the interests of his employer by acting as a representative of the business at the event" (R 351) may or may not be a justifiable finding as to the state of mind of the deceased, but is not even remotely based upon any evidence of conduct of the employer which would make his attendance at the ball an act in furtherance of public relations duties, or an act of representation of the newspaper in any capacity.

As noted, even in the absence of conduct on the part of the employer which makes attendance at a social event a specific requirement of his employment, it may still be found to arise out of a worker's employment according to Professor Larson if there is evidence that the employer derived substantial direct benefit to his business from the activity engaged in. The applicant in this case did not contend that any business was conducted or discussed during the evening Mr. Cheney spent in the company of the Hatches. Mr. and Mrs. Hatch and their son Randall Hatch each testified that the group conversed during the evening exclusively about matters unrelated to the newspaper. (R. 246-247, 261-263, 276)

Although counsel for the applicant argued before the Commission that Mr. Cheney's presence at the Governor's Ball may have benefited the public relations of the newspaper, no evidence to that effect was introduced. The applicant did present the testimony of a former Democratic Party official and a former aid to the Governor concerning the nature and purpose of the Governor's Ball. Both testified that it is held primarily to raise money for the Democratic Party. (R. 157, 169) Both were also asked to state their opinions about "why people attend the Governor's Ball." Counsel for the plaintiffs objected to this testi-

mony on the ground that no foundation was laid for their expression of opinions about the motives of other people who attended the Governor's Ball and that such opinions bore no relevance to the decisions of the parties in this case. (R 159-161, 171) Mr. Briggs was permitted to testify, however, that some people attended the ball as an expression of support for the Democratic Party (R 163), some people attended because of the entertainment and social aspects of the function, (R 162) and some people attended because of the "kind of interaction which took place there." (R 164) Mrs. Wilde testified that many people attend the ball to support the Democratic Party but that business and industrial leaders commonly attend because of a "subtle belief that it opens doors for them." (R 172)

Even if it were proper to receive the evidence from these officials about why people attend the Governor's Ball, it provides no support for any finding about what benefit to its business the Standard Examiner derived from Clifford Cheney's presence there. One could only speculate about the good will for the newspaper that might have been generated by the attendance of anyone in the Hatch's group, but no evidence of such a benefit can be found in the record.

The jist of the applicant's case, and the expressed basis for the Industrial Commission's award, was the evidence produced by the testimony of two co-workers of the deceased and of his brother-in-law and sister-in-law that Mr. Cheney's purpose in attending the ball was to discuss with Mrs. Hatch a series of articles he wanted published which she had apparently rejected, and to otherwise increase his influence over her in matters of

editorial policy.

Plaintiffs objected to the introduction of extensive hearsay evidence about statements made by the deceased concerning his motivation for accepting Mrs. Hatch's invitation, and the basis of this objection is the subject of later discussion. Assuming for the purpose of argument, however, that all the hearsay testimony about Mr. Cheney's motives is competent evidence upon which to make a finding in this case, and assuming further that his primary purpose in attending the ball was to discuss business and heighten his influence in newspaper policy decisions, the plaintiffs submit that such evidence still fails to establish that Mr. Cheney's death arose out of or in the course of his employment.

Though the Industrial Commission does not clearly articulate it, the legal view it expresses is that an accident which occurs when an employee is returning from an off-premises after-hours social event is compensable if the employee attended it with the intention of conducting or discussing business when he arrived, even if no business is actually conducted or discussed.[1]

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1 The Administrative Law Judge made the following remarks in his discussion of the evidence:

> No business was discussed by the parties at the ball. Being the guests of the Hatches, the tone of the conversation of the evening was more or less set by them notwithstanding the fact that Mr. Cheney was prepared to discuss the Freeman Institute article or other business related matters. He did not get the chance to do so, and as a guest of the Hatchs it appears he did not feel it in good taste to bring the matters up unless the opportunity was presented by Mr. or Mrs. Hatch. (R 332)

This explanation for the fact that those gathered did not discuss business is completely speculative and without the slightest evidentary foundation.

The Industrial Commission's construction of Section 45 of the Compensation Act is directly contrary to the holdings of this court. In each of the Utah decisions discussed earlier, it will be noted that the Court's determination of whether or not an accident arose out of or in the course of employment was based on an objective standard.

In the Auerbach and the Logan Board of Education cases, discussed earlier, the inquiry was the same; was this trip one which the applicant or deceased's employer specifically required him to make, was it otherwise part of the duties he was hired and assigned to perform, or was it of such benefit to the employer that it could fairly be said to be in fulfillment of a service to the employer. In neither of these cases nor in other Utah decisions on the subject was the motive or belief of the employee about the nature of the trip considered sufficient evidence in itself to bring such a trip within the course of his employment.

The defendant argued before the Commission that because the deceased was a managerial employee with flexible working hours his intention to conduct business during a social evening, even if not carried out, made his trip to attend the ball a job assignment. This court's opinion in Martinson, supra, belies such a view of the course of a managerial employee's employment. In considering the sufficiency of the evidence to support the Commission's finding that the applicant's trip to Park City had been a social one and not in furtherance of his business, the court defined the Commission's task to be a determination of whether the employee "was actually and basically 'involved in

the performance of his duties or was mainly involved in a social situation. . ." Martinson, supra, 606 P.2d at 257. The necessary evidence which this court said was lacking for a finding of compensability was evidence that the applicant had been "directed or required to go to Park City on insurance business" or had actually conducted business. Martinson, supra, 606 P.2d at 258.

The subjective intent of a white collar, managerial employee in attending a social event is not more dispositive of the issue of compensability than are the motives of other workers in attending such events. Mr. Cheney was not self-employed; he was subject to the direction and control of his immediate supervisor, Mr. Banks, and ultimately of the Standard Corporation of which Mrs. Hatch is president. If, through them, his employer did not make attendance at the Governor's Ball a part of his job duties, if they did not direct him to attend, and if his presence did not further the business interests of the newspaper in a tangible way, the activity was not part of the course of his employment under Utah law. An award of compensation benefits which is founded solely upon evidence that Mr. Cheney told several people he intended to discuss business during his evening with the Hatches is necessarily the result of a misapplication of Section 45 of the Act.

The Industrial Commission's misconstruction of the law is one which would have an onerous effect on workmen's compensation in this state if affirmed. This court has taken a strict view of the compensability of injuries which are suffered by "blue collar

workers," that is, people who work for wages during specified hours at a specified place. If such a worker claims that he was injured after hours and outside his employer's premises, he must produce clear evidence under Utah law that he was engaging in a service to his employer at the time. This strict view is warranted by the Act itself which is intended to compensate workers for injuries arising out of the hazards of their jobs, and not as a general accident insurance policy.

If the Commission's decision becomes the law of this jurisdiction, a strikingly difficult standard of compensability would apply to managerial workers who can always assert that the broad nature of their responsibilities makes all kinds of activities outside the office a service to their employer. If a mere intention to discuss business at a social activity is sufficient to make the trip to and from that event part of his employment, the average white collar worker could bring nearly every lunch time excursion or afternoon golf game within the course of his employment. No one could suggest that when a factory worker stops after work for a refreshment with co-workers, even if he was invited by his foreman, that an accident on his way home arose out of his employment. It would be grossly unfair to hold at the same time that when a manager accepts an invitation from a supervisor to attend a prestigous social event, his own intention to discuss business with his supervisor, even when not effectuated, makes his attendance there an incident of his employment.

The Industrial Commission's award of benefits in this case is based upon an erroneous construction of the Compensation Act

and sould be reversed.

POINT III

THE INDUSTRIAL COMMISSION'S AWARD IS BASED ON INCOMPETENT EVIDENCE.

The Commission majority summarized the evidence which it found sufficient to sustain the award made in this matter by stating that (1) the deceased attended the Governor's Ball with a business purpose in mind, and (2) the event was considered primarily as a "business linked event." Both of these findings rest, however, on incompetent evidence.

(a) Hearsay Evidence. This Court has held that, for the limited purpose of assisting the Commission in interpreting and understanding competent, material evidence, it may receive otherwise inadmissable hearsay testimony. Columbia Steel v. Industrial Commission, 92 Utah 72, 66 P.2d 124 (1937); Ogden Iron Works v. Industrial Commission, 102 Utah 492, 132 P.2d 376 (1942). It has consistently been held however, that

> since the action of the Commission results in a determination of the substantial rights of the parties, this Court has long been committed to the position that there must be a residuum of evidence, legal and competent in a court of law, to support a claim before an award can be made, and a finding cannot be based wholly on hearsay evidence.

132 P.2d at 379.

This Court quite recently reaffirmed its prior holding that in an administrative proceeding such as the Public Service Commission or the Industrial Commission,

> a finding of fact cannot be based solely on hearsay evidence, but must be supported by a residium of legal evidence competent

in a court of law.

Sandy State Bank v. W. S. Brimhall, 636 P.2d 481 (Utah 1981).

The Administrative Law Judge received extensive testimony from two reporters who worked under Mr. Cheney's supervision and from his brother-in-law and sister-in-law about his plans to spend the evening with Mr. and Mrs. Hatch. Specifically, Vaugn Roche testified that the afternoon of the Governor's Ball, Mr. Cheney told him he was attending "because management wanted him to." (R 187) John Harrington testified that Mr. Cheney told him on the same day that he would "have a chance to really do a sales job on the [Freeman Institute] story" at the ball. (R 137) Mrs. Pamela Skelton testified concerning conversations with Mr. Cheney's wife about why it was important to Mr. Cheney's business position that they attend the ball rather than spend the evening with their family. (R 213-217) Mr. Steven Skelton testified that on the day before the ball, Mr. Cheney told him that he looked forward to it as an opportunity to talk with Mrs. Hatch about newspaper philosophy and improve his understanding of her position on matters of policy. (R 228) This testimony was the subject of a continuing objection by counsel for the plaintiffs. (R 186-187, 213, 216)

In order to determine whether this evidence is competent to support the Industrial Commission's findings, the question whether it is admissible under any exception to the hearsay rule must be considered. Inasmuch as it was introduced in order to establish the deceased's intention to discuss business at the Governor's Ball, Rule 63(12) of the Utah Rules of Evidence might be suggested

as a basis for receiving it. This exception to the hearsay rule provides in pertinent part as follows:

> Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. . . (emphasis supplied)

The distinctive feature of the "state of mind" exception to the hearsay rule is that it arises only when hearsay statements about the declarant's state of mind are relevant to explain his own acts or conduct. Such statements are, therefore, inadmissible to prove or explain the acts or conduct of someone other than the declarant, and are inadmissible when the state of mind of the declarant in performing certain acts is not in issue.

Construing the rule in the case of State v. Wauneka, 560 P.2d 1377 (Utah 1977), this Court reversed the conviction of a defendant who was found guilty of manslaughter for the death of his wife. The trial court had received evidence of statements made by the deceased victim shortly before her death that the defendant would kill her if she left him or called the police. Holding the admission of such testimony to be both erroneous and prejudicial the court stated that,

> The statement made by the deceased that Ben would kill her if she called the police or left him may well be proof of her then state of mind and of her mental feeling; but her then mental condition is not

> an issue in this trial, nor is it relevant to prove or explain her subsequent acts or conduct.

560 P.2d at 1379. (A thorough exposition of the antecedents and current application of this exception to the hearsay rule in both civil and criminal context is found in an article at 1977 Utah Law Review No. 1, p. 85 "Relative Relevance -- A Limitation on the Use of State of Mind Testimony in Homocide Prosecutions")

Reviewing the hearsay evidence upon which the Commission relied in making its findings, it is apparent first that the testimony of Vaugn Roche that Mr. Cheney told him he was attending the Governor's Ball "because management wanted him to" is inadmissible under this exception to prove anything about what Mrs. Hatch or other management personnel wanted or said or did. It is equally obvious that the lengthy testimony concerning Mrs. Cheney's statements of why she felt it was important that they accept Mrs. Hatch's invitation, or what her husband had said to her on the subject, are not admissible under this exception since her state of mind and her conduct are in no way relevant to the findings the Commission was required to make.

The question presented then, is whether the remainder of the hearsay evidence of Mr. Cheney's statements about his plans to discuss employment related subjects during his evening with the Hatches is admissible under the state of mind exception to the hearsay rule.

By the express terms of the rule, such evidence is admissible only if the plans of the deceased to discuss subjects which were

not actually discussed are relevant in themselves or relevant to explain his conduct during the evening. However, under Utah law, as it has been noted, the issues in a case such as this are (a) whether Mr. Cheney was expressly or impliedly required by his employer to attend the Governor's Ball, or whether his supervisors otherwise by their conduct made his attendance part of his duties and (b) whether the Ogden Standard Examiner derived a substantial and tangible benefit to its business by Mr. Cheney's attendance at the ball. Mr. Cheney's statements about what he intended to do are simply not relevant, as the plaintiffs have contended here earlier, to either issue and therefore are not admissbile under the state of mind exception to the hearsay rule.

According to the decisions of this court, the hearsay evidence upon which the Commission relied cannot be the basis of the factual findings it made.

(b) Opinion Evidence. The only other evidence upon which the Commission relied in making its award was the testimony of Mr. Briggs and Mrs. Wilde about why people attend the Governor's Ball. Though, as noted earlier, their opinions differed, and though they both acknowledged that some people's reasons for attending differed from others, the Commission relied on this evidence in finding that the ball was a "business-linked" event and that the deceased's presence there was business related.

Evidence in the form of a witness's opinion is admissible under Rule 56 of the Utah Rules of Evidence in certain circumstances.

RULE 56
TESTIMONY IN FORM OF OPINION

> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.
> (2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

The pertinent testimony from Mr. Briggs concerning his knowledge of the reasons people attend the Governor's Ball is as follows:

Q. Are these kinds of people you've been describing the kinds that generally attend the ball?

A. Yes, they would attend the ball.

Q. Do you know why--I'm not asking specifically -- do you know why generally they attend the ball?

(Objection and discussion omitted)

* * *

Q. (By Mr. Low) All you can do is answer yes, because that was the question, yes or no. Now, what background or information do you have that would lead you to that opinion?

A. Well, my experience as an executive director.

Q. As an experienced executive director, do you have contact with the people you invite to the ball?

A. Yes.

Q. Has that been over a period of several years?

A. Two years. Particularly the two years, that was one of my chief responsibilities, yes.

Q. Do you in that position have personal contact with these people?

A. Yes.

Q. Have you ever discussed with people who are invited to the ball why they attend?

A. No. (emphasis supplied)

* * *

Q. (By Mr. Low) My question is this, Kent. On what do you base this opinion that you have that you know why people attend the ball?

A. Experience.

Q. I'd like you to tell us what experience.

A. All right. The ball, first of all, is a fine social event. The Utah Sumphony played while I was there. The RDT did a little stint. It was something that was-- dancing, good food. There was also a-- the chance for people who worked, knew each other, to see each other and talk. I's a social event as well as a fund-raising activity; but the primary responsibility of the ball was to raise money. I mean, you didn't do it just to bring people together. It was a way of funding the operations of the Democratic Party.

(R 160-162)

Mrs. Wilde's testimony about her own expertise in assessing the motives of those who attend the Governor's Ball was comparable. She discussed her planning functions as an assistant to the Governor but testified as to no specific facts from which their state of mind could be inferred.

Mr. Briggs and Mrs. Wilde's opinion testimony, whether they are considered lay witnesses or experts on the subject of the Governor's Ball,was improperly received. In either event, they are properly limited under the Rule to opinions which are based upon their own perceptions or facts known to them. They did not testify about having spoken to anyone concerning their reasons for attending the Governor's Ball, and testified as to no other facts from which they could made a reasonable inference about the state of mind of people generally who attended the Governor's Ball.

Furthermore, no theory was advanced by the defendant and none is apparent, of the relevance of this testimony to the issues before the Commission. If the pertinent questions to be resolved concerned the nature of Mrs. Hatch's invitation to Mr. Cheney and the relation of their activity during the evening to their business, evidence about the motives of people generally in attending the event is simply not probative.

Opinion evidence is not admissible when the trier of fact is capable of drawing his own inferences and conclusions from the facts presented. Yowell v. Occidental Life Ins. Co., 100 Utah 120, 110 P.2d 566 (1941); Sturgis v. Garett, 85 Idaho 364, 379 P.2d 658 (1963). A witness may not offer a conclusion which is

founded upon surmise and hearsay rather than testifying as to facts, and their reasonable inferences. Hansen v. Hansen, 110 Utah 222, 171 P.2d 392 (1949). And, even when a witness is permitted to repeat a conversation he had had with another he may not express his opinion as to the state of mind of the declarant. Kimball Elevator Co. v. Elevator Supplies Co., 2 Utah2d 289, 272 P.2d 583 (1954).

An expert witness may give his opinion about a matter which involves some aspect of trade or learning not within the general knowledge of the trier of fact. Webb v. Olin Matheson Chemical Corp., 9 Utah2d 275, 342 P.2d 1094 (1959). Thus, it may have been permissible to allow Mr. Briggs and Mrs. Wilde to testify about the nature and purpose of the Governor's Ball if some basis of its relevance were established. However, nothing in their credentials or experience qualified them as experts in assessing the state of mind of people generally who attend the event, and their opinions on the subject were inadmissible conclusions based on unfounded speculation.

Thus, the two findings of fact which the Commission expressly relied on in making its award, that the deceased intended to discuss business at the ball, and that many people attend the ball for business reasons, are founded entirely upon incompetent evidence which cannot support the conclusion that the deceased's death arose out of or in the course of his employment.

CONCLUSION

The accident which took Clifford Cheney's life was a terrible and tragic occurrence. However, the law does not impose upon the

employers' of this state the obligation to insure their employees or their dependents against any injury they suffer, but only to compensate them for accidents which arise out of or in the course of their employment. When an employee has an accident while discharging his duties or engaging in activities reasonably incidental to his duties,his accident is compensable. When a worker dies in an automobile accident while returning to his home from a public social event outside his employer's premises, his death is not compensable absent proof that he was specially required to attend it or was otherwise engaged in service to his employer at the time. This court has consistently reversed awards of the Commission where the findings or the evidence did not support such a conclusion.

In the case at bar the Industrial Commission found that Clifford Cheney was invited by the president of the corporation which employed him to attend a public social event and to visit her home. It found that he intended to discuss business with her during the evening but did not. These findings do not support the legal conclusion that his death en route to his home at the end of the evening was reasonably related to his duties as managing editor of the Standard Examiner. Furthermore, there is no evidence upon which the Industrial Commission could base findings which would support an award since the undisputed testimony was that the deceased was not required to attend the Governor's Ball and engaged in no service to his employer during the evening.

To affirm the order of the Industrial Commission, this Court would have to adopt a construction of Section 45 of the Compensa-

tion Act that renders all after hours social interchange between people who work together a part of their employment for the purpose of workmen's compensation. Such a construction of the law is directly contrary to this Court's prior application of the Act and completely inconsistent with its purpose. The plaintiffs respectfully request that the Industrial Commission's order be reversed.

DATED this 7th day of June, 1982.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the following Brief of Plaintiffs were mailed this _____ day of June, 1982, postage prepaid to the following:

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